MALAYSIAN REPORTS

UNION WORKSHOP (CONSTRUCTION) CO. v. NG CHEW HO CONSTRUCTION CO. SDN. BHD.

[F.C. (Ong Hock Sim, Raja Azlan Shah and Chang Min Tat F.JJ.) December 8 and 28, 1977]

[Alor Star — Federal Court Civil Appeal No. 131 of 1977]

Contract — Contract to build steel frames — Sub-contract — Whether payment to be by gross or by nett weight of steel used — Terms of sub-contract clear — Whether reference can be made to terms of main contract — Construction of deeds — Contra proferentem rule — Evidence Act, 1950, s. 92.

Evidence — Whether evidence of oral agreement admissible to vary written agreement — Evidence Act, 1950, s. 92.

Building contract — Contract to build steel frames — Construction of deeds.

The appellant had sub-contracted to build steel frames for the respondent in fulfilment of the respondent's much larger contract with FAMA. The dispute was related to the question whether payment for the construction was to be by the nett weight of the structural frames only or was to be by the gross weight of the steel used including bolts, washers and connecting plates. The terms of the sub-contract between the parties were clear and provided for payment not only for the steel girders or frames but also for ancillary steel used in the erection of the girders. The main contract between the respondent and FAMA however provided for payment for the nett quantities of steel work only. The respondent alleged that the main contract was shown to the appellant. The learned trial judge held in effect that payment was to be only for the nett weight of the steel used. The appellants appealed.

Held, allowing the appeal: (1) the meaning of the sub-contract was clear and the clear intention was that the sub-contractor should be paid for the gross weight. Evidence of the main contract was not admissible, as it refers to a method of payment on which the sub-contract was not silent and which was inconsistent with the terms of the sub-contract;

(2) as the meaning of the sub-contract was perfectly clear there could be no resort to other documents to give another meaning to it. Where the draftsmen had purposely left out any condition which he could without difficulty have put in, then the *contra proferentem* rule applied so that the inevitable conclusion was that the clause of the main agreement did not form part of the agreement between the parties and that the payment was to include the weight of steel other than the girders.

Case referred to:-

(1) *S. Chellathamby* v. *C.A. Vellupillay* [1933] M.L.J. 22.

FEDERAL COURT.

S.S. Ong for the appellant.

A. Jayadeva for the respondent.

Chang Min Tat F.J.: The appellant was the sub-contractor of the respondents and built for the respondents two steel frames in fulfilment of the latter's much larger contract with FAMA. The dispute between the parties was the amount due on the sub-contract. The payment on the sub-contract was on the weight of steel supplied and used in the construction at a specified $820 per ton. The price included the cost of construction.

It claimed for $118,683.68 said to be the balance due. The defence admitted to owing $64,586.08. The balance was trimmed down to $31,160 after some adjustments had been made in respect of several items which the appellant admitted as not properly within its claim or having been paid. On the issue whether the appellant was entitled to the $31,160, the claim went to trial. At the conclusion of the trial which spread over two days, the claim, as seen from the order drawn up but not shown in the record of proceedings, was dismissed with costs under the higher scale.

The difference of $31,160 arose from the dispute whether payment for the construction was to be by gross or by nett weight of the steel used. In the construction of a steel framework, it is clearly necessary that apart from the girders supplied and used, ancillary steel equipment such as bolts, washers, connecting plates would have to be supplied and welding done. The gross weight of the construction would include this supplementary weight of steel. The nett weight of steel used would be strictly limited to the supply of the structural frames. The dispute must be resolved by determining what exactly was agreed between the parties. The plaintiff contended that it was entitled to claim for the gross weight while the defendants countered by saying that the plaintiff was only entitled to the nett weight.

The defendants' contention was obviously grounded upon their own entitlement in their contract with FAMA, by clause 2-60 thereof, to payment for nett quantities only. This clause reads:

"2-60. Payment for steelwork shall be on nett quantities only, and on completion, the work shall be measured accordingly. The contractor must make his own allowance for waste, bolts, washers, holding down bolts, necessary welding, connecting plates etc. and the Contract Rates shall be inclusive of painting as specified."

The defendants therefore claimed that the sub-contractor was only entitled to charge what they themselves were entitled to charge. That was, in itself, not an unreasonable suggestion. But it would be so if, and only if, the same condition was included in the sub-contract between the contractors and the sub-contractor.

On this contention, counsel at the hearing framed the following issues for the decision of the trial court:—

"Issues involved:—

1. Whether the term in the principal contract between FAMA and the defendant, i.e. clause 2-60 (page 5 of Agreed Bundle Exhibit 'B') should be read and construed together with the terms in the sub-contract (on pages 1 and 2 of Exhibit 'A') between the plaintiffs and the defendants.

2. If the court holds that the specifications of the principal contract are to be read with and form part of the sub-contract, then the plaintiffs' claim ought to be dismissed.

3. If the court holds that the specifications of the principal contract do not form part of the sub-contract, then the plaintiffs are entitled to judgment for the sum of $31,160."

The learned trial judge treated this question very much as a matter of fact. It might be that he was led into doing so by the wording of the issues but it ought to be appreciated that the dispute between the contractors and the sub-contractor is properly to be resolved by the proper and reasonable construction of the written sub-contract between them, and that the contention of the contractors is nothing more or less than the existence of a separate agreement, which their counsel said was part of the actual contract, or as counsel put it, that clause 2-60 should be read and construed together with the terms of the sub-contract. In my view, this was a question of law.

Evidence was led at the trial by counsel for the contractors, and no objection was taken to it by counsel for the sub-contractor, that this contract between FAMA and the contractors containing this clause was shown to the sub-contractor before it tendered for the sub-contract. The learned trial judge held that the sub-contractor was shown the specifications, in particular this clause 2-60 and on this finding he gave his decision in favour of the contractors. He did not consider in his grounds of decision whether this evidence as evidence varying the terms of the sub-contract, was ruled out by section 92 Evidence Act and inadmissible. Whether he was addressed on this point which is a submission in law, is not clear from the record of appeal as the record did not contain the submissions of counsel which were in writing, but at the appeal before this court, counsel for the appellant submitted that the evidence was not admissible.

Now, the terms of the sub-contract are as follows:

"The sub-contractor undertakes to supply, fabrication, delivery and erection at site steel portal frame, channel purlins, bolts, nuts, purlin cleats, holding down bolts, rag bolts etc., all in accordance with the relevant drawings and specifications for two proposed factory at F.A.M.A. Padi Storage and Drying Complex Project, Alor Star, Kedah in the sum of $820 per ton."

The meaning is crystal-clear and beyond argument. The girders, or portal-frames as well as the ancillary steel for the erection of the girders or frames were to be paid for at $820 per ton. In other words, the clear intention of this sub-contract was that the sub-contractor was to be paid for the gross weight.

The question then is whether the evidence that clause 2-60 was operative as in the contention of the contractors could be led. As a general rule, by section 92 Evidence Act, evidence of any oral agreement is not admissible as between the parties to contradict, vary, add to or subtract from the terms of the sub-contract: see *inter alia S. Chellatamby* v. *C.A. Vellupillay*,[1] unless the evidence sought to be introduced falls within one of the provisoes (a)-(f) to this section. The only proviso that is apparently available to the contractors is (b) which reads:

"(b) The existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved...."

And it is clear that on either ground, the evidence is ruled out. The alleged separate oral agreement with regard to clause 2-60 refers to the method of payment, a matter on which the sub-contract is not silent and furthermore, it is inconsistent with its terms, as it refers to a different rate of payment. The proviso is not available to the respondents.

It follows that evidence that clause 2-60 formed part of the sub-contract was not admissible.

Not only that I am of the further view that the evidence that was led, if admissible, is entirely against such a finding. In the evidence of Mr. Ng Jit Nang, a director of the contractor firm who negotiated the sub-contract with the appellant, clause 2-60 was made known to the appellant before the sub-contract was entered into. That was denied by the appellant but if it was, then all that could be said from this mere fact was that the appellant knew that the contractors would be able to collect a sum for the nett weight of the steel. If they had to pay for the gross weight, that would not by itself mean they would be contracting for an inevitable loss since the difference in price of $860 they would be receiving from FAMA and the $820 they would have to pay could still cover this difference.

In my view, other factors which were not considered by the learned trial judge point to the truth. The sub-contract was drawn up by Mr. Ng Jit Nang himself. He knows some English, and obviously has some acquaintance with legal language. The sub-contractor Mr. Lim on the other hand has no English whatsoever. If as he said, he drew up the sub-contract after agreement had been reached that clause 2-60 formed part of it, it would be the simplest matter for Mr. Ng Jit Nang to say so in the agreement. But he did not do so. He had failed to include a condition that the said clause was agreed to prior to and formed part of the agreement and his failure must mean that the alleged condition did not form part of the agreement reached.

The learned judge however thought "in my considered view, the agreement purposely left out these terms simply because the specifications show the details regarding them, particularly the last clause 2-60...." The respondents had clearly shown the appellant the specifications since otherwise the latter would not have been able to build the frames. But by itself that is inconclusive. With great respect, the learned judge's conclusion not only offended against the main and well-known principle of construction of deeds which is to ascertain the intention of the parties within the four corners of the document itself, and applied the wrong law of evidence, but was also against the weight of the evidence.

Where as here, the meaning is perfectly clear, there can be no resort to other documents to give another meaning to it. And where the draftsman had purposely left out any condition which he could without difficulty have put in, then the *contra-proferentem* rule applies to arrive at the inevitable conclusions that the clause did not form part of the agreement between them, and that the payment was to include the weight of steel other than the girders.

The appeal must be allowed with costs both here and in the court below. The judgment will be in the sum of $31,160.

Ong Hock Sim and **Raja Azlan Shah F.JJ.** concurred.

Appeal allowed.

Solicitors: *Mah-Kok & Din; Jayadeva & Kamal.*